IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellant,

against

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Opinion Below

The opinion of the three-judge District Court dated April 22, 1976 declaring New York Election Law § 22 unconstitutional and enjoining its enforcement as to appellee Cunningham is not yet reported (Appendix to Jurisdictional Statement ["A.J.S."], 1a-20a).

Jurisdiction

The final judgment and order of the District Court was entered April 26, 1976 (A.J.S., 21a). Appellant filed a

notice of appeal to this Court on June 21, 1976 (A.J.S., 22a-24a). The jurisdiction of this Court rests upon 28 U.S.C. § 1253.

The Challenged Statute

New York Election Law § 22 (McKinney's Consolidated Laws of N.Y., Vol. 17, Part 1, p. 36) provides as follows:

> If any party officer shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years.

Question Presented

1. Does New York's interest in avoiding corruption and the appearance of corruption in its political system permit it to require a prominent, unsalaried political party officer, who refuses to give an official inquiry a full accounting of the conduct of his office, to yield that office?

Statement of the Case

This action was initiated by appellee Patrick J. Cunningham under the Civil Rights Act. 42 U.S.C. § 1983, for declaratory and injunctive relief to invalidate New York Election Law § 22. This statute provides that the refusal of a political party officer to waive immunity against subsequent criminal prosecution before a Grand Jury or any other duly authorized "hearing or inquiry concerning the conduct of his party office or the performance of his duties" automatically terminates his tenure in office and disqualifies him from holding any party or public office for five years thereafter. A party officer is defined by N.Y. Election Law § 2(9) as "one who holds any party position or any party office whether by election, appointment or otherwise".

Appellee (the designation to be applied solely to appellee Cunningham) holds four party offices in the Democratic Party of the State of New York. He is Chairman of the New York State Democratic Committee and the Bronx County Democratic Executive Committee (A. 16)* and is a member of the Executive Committee of the New York State Democratic Committee and the Bronx County Democratic Executive Committee (A. 16).** Each of those positions is a party office as defined by the Election Law. See N.Y. Election Law §§ 2(9), 11, 12 and 15.

As Chairman of the State Committee, appellee is designated and acknowledged as "top leader of the Democratic Party in New York State", *Rules of the Democratic Party of the State of New York ("Democratic Party Rules")* Art. IV, § 1(b)(ii) (see A. 18 *et seq.*). He has the power to select nominees for one of the commissionerships of the state board of election, N.Y. Election Law § 468, which enjoys broad powers of enforcement of the election laws. N.Y. Election Law § 470(a). The State Committee which appellee chairs enjoys the power to designate candidates for statewide office for entry upon party primary ballots, N.Y. Election Law § 131(2), and has the exclusive responsibility to make the nominations of its party for the office

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* "A" refers to the Appendix.

** Neither the New York State Democratic Committee nor the Bronx County Democratic Executive Committee, defendants below, have appealed. Their participation below was merely passive.

of elector of president and vice-president of the United States, N.Y. Election Law § 131(1). As Chairman of the Bronx County Committee, appellee has the duty to certify to the New York City Council the nominee of his committee as commissioner of the New York City board of elections. N.Y. Election Law § 31.* As County Chairman appellee is also authorized to authenticate and file his party's nominees for "election officers" in every election district in Bronx County, N.Y. Election Law § 40; he is also given the power to request the removal of any election officer appointed upon the recommendation of his committee, which request must be honored by the Board of Elections. N.Y. Election Law § 45. In addition, the Bronx County Committee may in most circumstances fill vacancies which occur in party nominations within Bronx County. N.Y. Election Law §§ 131, 140; see *Seergy* v. *Kings County Republican County Committee,* 459 F. 2d 308, 310-11 (2d Cir. 1972). Appellee, however, receives no compensation or salary for any of his party offices, although the State Committee or its Executive Committee has the power to "fix a salary for the Chairman of the State Committee in an amount as may be determined from time to time." *Democratic Party Rules,* Art. VI, § 4. Aside from his party offices appellee is an attorney in active practice (A. 13).

Members of a party's state and county committees are elected biennially by the enrolled voters of the party. N.Y. Election Law § 13. To attain eligibility to vote in a party primary a voter must enroll in that party at least thirty days before the general election held most immediately prior to the primary. N.Y. Election Law §§ 131, 186. See *Rosario* v. *Rockefeller,* 410 U.S. 752, 753-54 (1973).

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* While the right to nominate commissioners of the New York City board of elections is given by statute neutrally to the two political parties receiving the most votes in the last preceding election for governor, N.Y. Election Law § 31, in recent history the Democratic Party has always been one of the two parties to qualify for this power. Commissioners of Election, once appointed, enjoy subpoena power, N.Y. Election Law § 38, and may be removed only by the Governor, N.Y. Election Law § 30.

In late December, 1975, appellee was subpoenaed to appear and testify before an Extraordinary Special Grand Jury for Bronx County, New York (A. 5). This Grand Jury was duly empowered to inquire concerning the conduct of appellee's party offices and the performance of his duties in those offices (A. 15). Appellee sought to quash the subpoena in the New York courts, relying in part on the grounds raised here—the alleged unconstitutionality of N.Y. Election Law § 22 under the First, Fifth and Fourteenth Amendments of the United States Constitution. His efforts in the New York courts were unsuccessful. *Matter of Cunningham* v. *Nadjari,* 51 A D 2d 927 (First Dept.), *aff'd.* 39 N Y 2d 314 (1976).

Following final adjudication of his action to quash the subpoena in the New York courts, appellee attended before the Grand Jury in response to the subpoena, on April 12, 1976. At that time appellee was requested by the Deputy Attorney General in charge of the Investigation of the New York City Criminal Justice System to execute a waiver of immunity to prosecution, and appellee refused to do so.*

On April 13, 1976 appellee commenced this action by order to show cause in the United States District Court for the Southern District of New York. After a hearing the same day, District Judge TENNEY issued a temporary restraining order barring enforcement of N.Y. Election Law § 22 against appellee and barring replacement of appellee in any of his party offices. He also requested the convening of a statutory three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The statutory court was designated by order of Chief Judge KAUFMAN, U.S.C.A., dated April 14, 1976. Appellee's motion for a preliminary injunction was returnable on April 19, 1976, at which time

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* In the absence of a waiver of immunity, appellee's testimony before the Grand Jury would have entitled him to transactional immunity as to the matters testified upon. N.Y. Criminal Procedure Law §§ 50.10, 190.40, 190.45.

the three-judge court heard oral argument and consolidated the trial of the action on the merits with the application for a preliminary injunction, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure (A. 11). At the hearing, the New York Civil Liberties Union appeared and argued *amicus curiae* in support of appellee's challenge to the constitutionality of N.Y. Election Law § 22.

In an opinion dated April 22, 1976, the District Court held N.Y. Election Law § 22 unconstitutional in violation of appellee's rights under the Fifth and Fourteenth Amendments to the United States Constitution and granted appellee the declaratory and injunctive relief sought in his complaint. The court did not pass on appellee's claim that the challenged statute violated his First Amendment rights. The court relied on *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973), and held that "[s]ection 22 of the New York Election Law is similar in operation to the statutes struck down in the aforementioned cases in that it conditions tenure in office upon the forfeiture of the privilege against self-incrimination. As such, it would appear to fail to measure up to constitutionally established standards." (A.J.S., 11a). Both Judges KAUFMAN and MANSFIELD, in addition to joining in the decision of the District Court, entered separate concurring opinions (A.J.S., 18a-20a).

Summary of Argument

The interest of the State furthered by N.Y. Election Law § 22 is that in safeguarding against corruption and the appearance of corruption in the political system of New York. Section 22 advances this interest by seeking to encourage officers of political parties—who play an integral role in the political system and the electoral proc-

ess—to give an unrestricted accounting of the conduct of their party office. A party officer who declines to give such an accounting puts a cloud over his office and his party. To preserve the confidence of the electorate in the political system and the representative form of government, the State may require that officer to yield his party office in order to remove that cloud.

The interest of the party officer, including appellee Cunningham, in his unsalaried office is non-economic, and the loss of that office imposes no significant cognizable economic sanction upon the officer. He is not denied employment, a professional license, or any business opportunities. If the loss of party office produces any diminution of professional standing or reputation which could be said to have an adverse economic effect on the officer, it would be occasioned by the adverse judgments made by the public with respect to the officer's candor; and it is the danger of those very judgments which requires the State to effect the removal of the officer.

The *Garrity-Lefkowitz* line of cases relied on by the District Court differs from this case in three ways: (1) each involved the imposition of a substantial economic sanction for the exercise of the privilege against self-incrimination; (2) each involved an attempt by the State to use a business relationship with the individual to further a governmental interest unconnected to that relationship; and (3) none of those cases involved a highly visible, unique office which would be put under a cloud by the actions of a non-candid office-holder. In this case the party officer suffers no economic sanction, holds a highly visible office subject to public judgment, and the State is acting in furtherance of its single relationship to the officer.

The Court should apply here the same kind of balancing test as it did in *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976). The application of that test supports the constitutionality of N.Y. Election Law § 22, since the

effect of the statute on the officer does not amount to coercion of the officer, and the interest of the State here is one that has been recognized as extremely compelling. Not every undesirable consequence following from the exercise of the privilege against self-incrimination is an unconstitutional "penalty".

Nor does § 22 infringe upon the constitutionally protected associational rights of appellee or the members of his political party. A political party and its officers play an important role in the public electoral process and accordingly the State has a right to regulate the conduct of party officers. Freedom of association is not absolute and the State may impose narrowly drawn limitations upon it. N.Y. Election Law § 22 would not prevent appellee from associating with his party, or from speaking, advising or counseling with any person or group. It would only prevent him from holding the formal party or public offices created by New York law. N.Y. Election Law § 22 does not offend the Constitution.

POINT I

New York's interest in avoiding corruption and the appearance of corruption in its political system permits it to require a prominent, unsalaried political party officer, who refuses to give an official inquiry a full accounting of the conduct of his office, to yield that office.

The District Court believed that its decision in this case was "clearly foreordained" (A.J.S., 19a) (KAUFMAN, C.J., concurring) by the holdings of this Court in *Garrity* v. *New Jersey, supra; Spevack* v. *Klein, supra; Gardner* v. *Broderick, supra; Uniformed Sanitation Men* v. *Sanitation Commissioner, supra;* and *Lefkowitz* v. *Turley, supra.* Yet the relationship of the State to the individual litigant in each of those cases, together with the interests the State sought to uphold in each instance, were so significantly

different from those here involved as to permit this Court to examine the present considerations free of the direct precedential constraints of those cases. It is our contention that in all critical respects this case more closely parallels *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976), in which the balance of interests weighed in favor of the actions of the State. Upon an examination of the considerations here presented, we believe the Court will find that the balance of interests favors the State to such a significant degree as to require reversal of the District Court and the conclusion that New York Election Law § 22 does not offend the Constitution.

A. The interests of the State

The primary interest which New York seeks to uphold in Election Law § 22 is one not present in any of the *Garrity-Lefkowitz* line of cases: it is the interest in safeguarding against both "the reality and appearance of corruption", *Buckley* v. *Valeo,* 424 U.S. 1, 28 (1976), of officers of its political parties. It seeks to guard against the reality of political corruption by encouraging candor on the part of party officers—assured public accounting of the conduct of a party office is an ideal method of discouraging abuse of that office. It also seeks to curb the appearance of corruption of party officers, by requiring that any officer unwilling to give such an accounting, *whether guilty or innocent,* yield his party office. The refusal of a party officer to account for his conduct in office unquestionably puts a cloud over that office. While this Court may forbid the *State* to draw any inference from a party officer's exercise of his Fifth Amendment privilege against self-incrimination, see *Griffin* v. *California,* 380 U.S. 609, 615 (1965), no tribunal can compel the *public at large* to refrain from the virtually inevitable drawing of such an inference. Yet a State, like the Federal Government, must be responsive to its citizenry if "confidence in the system of representative Government is not to be eroded to a disastrous extent". *CSC* v. *Letter Carriers,* 413 U.S. 548,

565 (1973); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 606 (1973); *Buckley* v. *Valeo, supra,* 424 U.S. at 27.

Unfortunately, political corruption is more than an abstract fear. In the realm of corrupt campaign contributions alone, "[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Buckley* v. *Valeo, supra,* at 27 (footnote omitted). These exact considerations motivated Congress in 1974 to amend the Federal Election Campaign Act of 1971 to incorporate the most sweeping campaign finance reforms in our nation's history, upheld in large part by this Court in *Buckley* v. *Valeo, supra.* The same year, New York enacted its own campaign finance reform law, N.Y. Election Law Article 16-A, §§ 465 *et seq.,* creating a new state board of election mandated to "maintain citizen confidence in and full participation in the political process of our state to the end that the government of this state be and remain ever responsive to the needs and dictates of its residents in the highest and noblest traditions of a free society." N.Y. Election Law § 466.

The New York Legislature has twice in recent years enacted other legislation in support of the State's interest —which is really the interest of the public—in the accountability of participants in its governmental process. In 1974, the Legislature enacted a Freedom of Information Law, N.Y. Public Officers Law Article 6, §§ 85 *et seq.,* declaring its intent in the following terms: "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." N.Y. Public Officers Law § 85.

In 1976, the Legislature even more strongly affirmed the interest of the public in the accountability of those who

serve it in the governmental process, by enacting an Open Meetings Law, N.Y. Public Officers Law Article 7, §§ 90 *et seq.* (effective Jan. 1, 1977), declaring: "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it." N.Y. Public Officers Law § 90.

New York does not purport to regulate the conduct of its party officers to as great an extent as it does its public officers. The much more modest reach of N.Y. Election Law § 22 is, however, aimed at the same interests reflected in these two more recent, sweeping enactments. By § 22, New York seeks to fulfill its responsibility to preserve the confidence of the public in the system of representative government, and particularly in the political parties which comprise such an integral part of that system. This duty is derived from, among other sources, the Tenth Amendment to the Constitution. See *Oregon* v. *Mitchell,* 400 U.S. 112, 124-25 (Opinion of Black, J.), 207-8 (Opinion of Harlan, J.), 293-94 (Opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.) (1970); also see *Dunn* v. *Blumstein,* 405 U.S. 330, 343-44 (1972). In New York, as noted above, the function of the major political parties is woven into the very fabric of the electoral process. See N.Y. Election Law §§ 30, 31, 40, 45, 131, 140, 468 and 470. Nationally, the two major parties are thought by some to have attained a "permanently preferred position", *Buckley* v. *Valeo, supra,* at 293 (Opinion of Rehnquist, J.). N.Y. Election Law § 22 prevents a party officer like appellee from putting a cloud over his office and his party, requiring of that officer either that

he candidly account for the conduct of his office or that he yield his office and pursue his constitutional rights, including an unfettered privilege against self-incrimination, as a private citizen. Once he is out of office the State is constrained to conduct any criminal investigation of him in the same manner as it would with any citizen. Yet, at the same time, the State has achieved its purpose of removing from a party office—and a party—even the appearance of corruption or impropriety.*

Nor is the answer to the State's need for a full accounting by its party officers simply to immunize those officers from prosecution for the misdeeds thus brought to light.** The responsibility of the State to the public extends not merely to obtaining a full accounting by party officers, but also to punishing those who abuse their trust and transgress the law. Plainly, the great indignation and outrage with which our nation's citizens reacted to the Watergate episode would have been inflamed rather than quieted if the price of uncovering the true extent of the misdeeds there committed had been full immunity from prosecution for the wrongdoers.*** A State forced to choose between

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* It would seem that appellee himself is not oblivious to the State interests noted here. Following the decision of the District Court in this case, appellee was in fact indicted for "conduct in which he allegedly engaged while a party official." Appellee's Motion to Dismiss or Affirm at 8. Subsequent to his indictment, appellee voluntarily suspended himself from his duties as State Chairman, although apparently retaining the office itself. He remains in that status to the date of this writing.

** As noted previously, New York confers not merely "use" immunity but "transactional" immunity upon Grand Jury witnesses in the absence of a waiver.

*** It is noteworthy that none of the high officials called to testify under oath at the Senate Watergate Committee hearings in 1973 invoked a claim of Fifth Amendment privilege. They no doubt recognized the strong likelihood of an adverse public reaction to any assertion of such a claim. Indeed, the question may hypothetically be posed whether the District Court's rationale in this case might not be so far-reaching as to prohibit a President or other executive officer from suspending or firing a trusted aide who invoked his Fifth Amendment privilege to avoid testifying under oath concerning his official duties.

an accounting from or a prosecution of a party officer is in an intolerable position—to choose an accounting at the expense of prosecution is akin to converting party office into a virtual license to steal for those inclined to dishonesty; to opt for prosecution is to deny the public (including members of the officer's party) the most fundamental information about the officer's discharge of the public and party duties accruing to his office. The *State* would thus be placed "between the rock and the whirlpool", *Garrity, supra*, 385 U.S. at 498, in discharging its duty to maintain the confidence of the public in its political system. It should not be required to make that Hobson's choice.

B. The interests of the party officer

Appellee receives no salary from any of the party offices he holds. He is an attorney and earns his living from a law practice in New York City. Thus the operation of N.Y. Election Law § 22 upon appellee would deprive him of no direct economic benefit (A.J.S., 13a). The District Court, however, perceived an economic effect upon appellee in three ways. First, it noted that § 22 also bars appellee from public office for five years, and that public offices are normally salaried (A.J.S., 14a). Yet appellee holds no public office (and indeed his right to hold such office while retaining his party offices is restricted, see N.Y. Public Officers Law § 73[8]). Thus appellee has no "legitimate claim of entitlement", *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), to any public office, and enjoys no property right to such an office which is cognizable under the Constitution. The loss of the opportunity for a finite period of time to attain a benefit to which he has no right cannot realistically be found to constitute a substantial economic effect.*

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* In addition, a State may properly burden one seeking to obtain a benefit via strictures impermissible as to one already enjoying that benefit. Compare *Lavine* v. *Milne*, 424 U.S. 577, 587 (1976) with *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The District Court also noted the possibility that the Democratic State Committee might vote appellee a salary as State Chairman, which it is empowered to do under the Democratic Party Rules. Nothing in the record supports the likelihood of this occurrence, and mere speculation by the District Court does not translate into a significant economic effect upon appellee. Nor is there any indication in the record that appellee could not obtain equivalent remuneration elsewhere if he were in fact deprived of a salaried party office; nor that his private law practice could not produce equivalent compensation for an equivalent time commitment.

Finally, the District Court stated that "[w]e would, moreover, be naive if we did not recognize the inevitable economic impact upon Cunningham, a practicing attorney, concomitant with being forced out, under a cloud, of the state party chairmanship" (A.J.S., 14a). The District Court thereby imputed to the State the very judgment by the public which N.Y. Election Law § 22 is intended to avoid with respect to party officers. If appellee's law practice were to suffer after yielding his party office, it would be by reason of the adverse judgments made of him by his clients and potential clients, not by the State. The State is not responsible for—and can do nothing to control—those judgments by the public. The "cloud" pictured by the District Court is created solely by appellee's refusal to give a full accounting of the conduct of his party offices, and any adverse conclusions drawn from that refusal by the public cannot be attributed to the State. Indeed, as observed, those are the very judgments which impel the State to deny continuation in office to any party officer whose conduct gives rise to such judgments.

Since the loss of party office yields no economic consequences attributable to the State, the party officer's interest in his office must be measured in terms of non-economic concepts such as "professional standing" and "reputation"

(A.J.S., 14a). The District Court attempted to use *Spevack* v. *Klein, supra,* to show that infringement of these interests alone was sufficient to invalidate the challenged statute. *Spevack* involved the attempted disbarment of an attorney for invoking his privilege against self-incrimination at a disciplinary proceeding. *Spevack* v. *Klein, supra,* 385 U.S. at 513. Yet this comparison fails because it is clear that in *Spevack* the loss of professional standing and reputation came as a *direct result* of the serious economic loss imposed there (disbarment from the legal profession). *Id.* at 516. Without disbarment there would be no loss of professional standing or reputation, and the significance of those interests standing alone was in no way measured in *Spevack.* Further, of course, professional standing and reputation may well translate into an economic value for a practicing attorney, who is engaged in a remunerative endeavor. Since appellee is not compensated for his party offices, the asserted loss of professional standing and reputation *in those offices* could have no cognizable economic consequence to him. Lastly, once again, any such loss of professional standing or reputation occurring to appellee is due to the adverse judgments of the public at large, rather than to any instrumentality of the State. The State draws no inference from the yielding of a party office; any inferences drawn by the people will be decided in the public arena, far beyond the purview of the State.*

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* Even injury to appellee's reputation directly produced by actions taken under color of state law would not deprive him of any interest protected by the Constitution. *Paul* v. *Davis,* 424 U.S. 693, 712 (1976). Thus, for instance, the State could certainly publish a list of the names of party officers invoking their privilege against self-incrimination before a duly authorized inquiry. See *id.* at 697, 712. What the State may do directly is not rendered impermissible because it is attained by indirection. Cf. *Speiser* v. *Randall,* 357 U.S. 513 (1958). But at the same time the State may not produce certain otherwise permissible harms on a basis that infringes on a constitutionally protected right such as freedom of speech. *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972).

C. The balance of interests presented in this case supports the constitutionality of New York Election Law § 22

The District Court concluded, erroneously in our view, that the *Garrity-Lefkowitz* line of cases controlled this action. A review of those cases shows otherwise. In *Garrity,* 385 U.S. 493, the Attorney General of New Jersey sought to question several police officers in connection with an investigation into the alleged fixing of traffic tickets. *Id.* at 494. Before questioning, the officers were warned that anything they said could be used against them and that their failure to answer any question through invocation of their privilege against self-incrimination would lead to removal from office. *Ibid.* The officers answered the questions, and were convicted in subsequent prosecutions in which their answers were used against them. This Court ultimately reversed the convictions on the ground that a state may not "use the threat of discharge to secure incriminatory evidence against an employee", *id.* at 499, and that "the Fourteenth Amendment . . . prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . . ." *Id.* at 500.

In *Spevack,* 385 U.S. 511, as noted above, an attorney licensed by the State of New York to practice law was called before a disciplinary proceeding and declined to produce subpoenaed financial records on Fifth Amendment grounds. He was subsequently disbarred because of that refusal. *Id.* at 512-13. The documents sought in the disciplinary proceeding related to "detailed financial aspects of contingent-fee litigation". *Id.* at 517. The Court held the disbarment unconstitutional because "[t]he threat of disbarment" was too "powerful an instrument of compulsion" of self-incriminating evidence and violated the privilege against self-incrimination. *Ibid.*

Next in line was *Gardner,* 392 U.S. 273, in which a police officer was called before a grand jury investigating alleged

bribery and corruption of police officers in connection with unlawful gambling operations. The officer declined to execute a waiver of immunity and after a hearing was discharged solely for that refusal. *Id.* at 274-75. The New York courts upheld the discharge but this Court reversed, holding that the privilege against self-incrimination does not permit the State "to coerce a waiver of the immunity it confers on penalty of the loss of employment". *Id.* at 279.

In *Uniformed Sanitation Men,* 392 U.S. 280, a number of municipal sanitation workers were called to testify before the Commissioner of Investigation of the City of New York, who was investigating charges that employees of the Department of Sanitation were charging improper fees and were diverting to themselves the proceeds of fees that they did charge. *Id.* at 281. Twelve of the employees declined to testify on Fifth Amendment grounds and were discharged for that reason. *Id.* at 282. The Court held the discharges unconstitutional because they resulted from forcing upon the employees "a choice between surrendering their constitutional rights or their jobs." *Id.* at 284.

Most recently, in *Lefkowitz,* 414 U.S. 70, two contractors doing business with the State of New York were called before a grand jury investigating charges of conspiracy, bribery and larceny, and they declined to execute waivers of immunity. State law and a required provision of their public contracts imposed upon them a five year disqualification from public contracting and the optional cancellation of existing contracts as a result of their refusal to execute the waivers. The Court held the disqualification and cancellation provision unconstitutional on the ground that the waiver, and thus the testimony, obtained by the operation of those provisions would have been compelled in violation of the privilege against self-incrimination, and that "[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary". *Id.* at 82-83.

Each of the *Garrity-Lefkowitz* line of cases shares three outstanding characteristics which sharply distinguish them from this case. First, in each case the State had sought to utilize the coercive power of its relationship to the individual in its capacity as *employer* (in *Garrity, Gardner, Sanitation Men* and, in a practical sense, *Lefkowitz*) or *business regulator* (in *Spevack*) to assist it in its capacity as *lawmaker* and *law enforcer*. This was held to be an unfair abuse of the power it happened to enjoy over each individual—by reason of what was at bottom a contractual, business relationship—to achieve an end to which the business relationship was irrelevant. This overlap of roles is shown most clearly in *Lefkowitz*, in which the State's interest in the honesty of its contractors—who are private businessmen—was virtually the same as its interest in preventing crime generally among private citizens; in *Spevack*, in which the attorney was a private citizen in every respect but that his profession is licensed by the State;* and in *Sanitation Men*, in which the alleged crimes under investigation did not turn in a substantial way on the public nature of the employee's work (the diverting of an employer's income is illegal wherever it occurs). The overlap is less compelling in *Garrity* and *Gardner* because the investigations turned on performance of functions unique to the duties of police officers (unlike *Sanitation Men*) and thus bore more centrally on the officer's performance in the employer-employee relationship. Yet even there the State as employer could have settled for immunized testimony, but chose to forego that option to preserve its rights as law enforcer. Since the limits imposed by the Constitution on the actions of the State "may

* This statement does not imply that the State has no interest in upholding the integrity of the legal profession—to the contrary, it has such an interest at least as much or even more than as to other forms of regulated business activity. *Cf. Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). That interest, however, is less compelling than the interests at stake in this case.

vary in their stringency depending on the capacity in which the government is active", *Buckley* v. *Valeo, supra*, 424 U.S. at 290 (Opinion of REHNQUIST, J.); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the State ought not utilize its power in one capacity to attain an end not permitted to it in another capacity. Each of the *Garrity-Lefkowitz* line of cases stands for this principle to a varying but considerable degree.

The second common characteristic of the *Garrity-Lefkowitz* line of cases is that none of these cases involved an individual holding a uniquely titled office readily differentiated in the mind of the public from any other office. In *Lefkowitz* and *Spevack* the individuals held no office whatever—they were private citizens. In *Sanitation Men* the individuals were employed by the State but held no public office. In *Gardner* the individual was a police officer who, it is true, held a position of trust, but he had no individual identity to the public as a police officer. The public coming in contact with Officer Gardner would have no particular method of singling him out from the next officer nor of knowing that this particular individual had failed to give a full accounting of his conduct as a police officer. In short, he put no cloud over his office in the public mind by his refusal to testify. Similarly, in *Garrity*, all but one of the questioned individuals were ordinary police officers whose actions placed no cloud over a particular office. While Garrity himself was the chief of police of the Borough of Bellmawr, New Jersey, it is significant that the opinion of the Court made no reference whatever to this fact; it is brought out only in Justice HARLAN's dissent (*Garrity*, 385 U.S. at 502). Thus the majority opinion in *Garrity*, as in all the other cases in that line, is predicated on a fact pattern reflecting the absence of an individual holding any particular identifiable office, whose actions in declining to account for his conduct in that office might draw public discredit to it.

The third and final characteristic shared by the *Garrity-Lefkowitz* line of cases is the most apparent—the substantial economic harm visited upon each of the affected individuals resulting from the invocation of his privilege against self-incrimination. In *Spevack, Gardner* and *Sanitation Men* the individuals lost their very livelihood along with whatever pension and other ancillary benefits attended these positions. In *Garrity* the threat of denial of livelihood was the same, though not actually invoked. In *Lefkowitz,* the contractors lost the opportunity to do business with the State and the Court observed that "[w]e fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Lefkowitz,* 414 U.S. at 83 (footnote omitted).

The present case contains none of the three characteristics common to the *Garrity-Lefkowitz* line of cases. First, the relationship of the State to its party officers is not bifurcated—it is the single, unitary one it holds as guarantor of a political system free of the appearance and reality of corruption. The State does not wear two hats in its dealings with party officers; its interest is the same at all times. The key to the unitary nature of this relationship is that the State's capacity as political guarantor *incorporates* its capacity as law enforcer as to party officers. Its only requirement of party officers is obedience to the law in the discharge of party office. N.Y. Election Law § 22 does not permit the State to inquire as to activities outside the scope of party office; it seeks unrestricted inquiry only as to the performance and conduct of the office. Accountability is desirable because it produces, among other benefits, obedience to the law; that belief is one of the premises of our political system. Thus N.Y. Election Law § 22 is not an instrument by which the State unfairly utilizes one relationship to further its purposes in another, unrelated capacity. Rather, it seeks to further the State's only interest in relation to party officers.•

Secondly, it is clear that Mr. Cunningham does hold the kind of highly visible, identifiable, differentiated office missing from the *Garrity-Lefkowitz* line of cases. He is "the top leader of the Democratic Party in New York State", *Democratic Party Rules*, Art. IV § 1(b)(ii), and as such enjoys enormous visibility in the public eye.•• As Bronx County Chairman he is also prominent in the political affairs of New York City. Thus the failure of such a prominent officeholder to give a full accounting of his conduct as State and County Chairman can have the effect of creating doubt and suspicion in the public eye as to the honesty and reliability of the officeholder and thus the office itself and the party he represents. It is precisely in that circumstance that the State's interest in preserving

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• The existence of an unchallengeably valid state interest sought to be attained through N.Y. Election Law § 22 clearly distinguishes it from what the Court has at least on one occasion described as the purpose of the statutes challenged in *Sanitation Men* and *Gardner*. The Court used the language of *United States* v. *Jackson*, 390 U.S. 570, 581 (1968), to describe those provisions as having *"no other purpose or effect* than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Fuller* v. *Oregon*, 417 U.S. 40, 54 (1974) (emphasis supplied).

•• As State Chairman Mr. Cunningham enjoys the power, *inter alia*, "to convene periodic meetings with the Democratic leaders of the Legislature in Albany and with Democratic members of the New York State Congressional Delegation in Washington in order to translate the views of the State Party on substantive issues into public policy and to inspire and mobilize vigorous public and party support of all major legislation which implements the New York State Democratic Party platform and progress, and to challenge or expose the errors or inadequacies of the Republican Governor and other Republican officials of the State." *Democratic Party Rules*, Art. IV § 1(b)(iii).

the confidence of the electorate in the political system may be most strongly asserted.*

The final distinction between this case and the *Garrity-Lefkowitz* cases, as has been noted, is the absence here of any significant economic deprivation to appellee resulting from his invocation of his privilege against self-incrimination. Appellee's professional status and his ability to earn a living in his chosen occupation remain unimpaired.

The foregoing comparison of the present case with the *Garrity-Lefkowitz* line of cases is intended to show that the factors which supported rejection of the actions of the State in those cases are simply not present here. N.Y. Election Law § 22 imposes no economic sanction upon the exercise of the privilege against self-incrimination, applies only to indentifiable party offices,** and does not involve

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* The present Chief Judge of the New York Court of Appeals has observed that "[t]he lowness in rank of the officer involved is not unimportant. One is entitled to doubt that the Supreme Court would find it coercive to require a Judge, a ranking executive officer or a member of the Legislature to surrender his privilege against self-incrimination in order to qualify for or retain his office". *People* v. *Avant*, 33 N Y 2d 265, 274 (1973) (BREITEL, J., concurring). The District Court rejected this view with the observation that it found "no merit in the suggestion that advancement in office diminishes one's constitutional rights." A.J.S., 12a. Appellant makes no such argument; we contend rather that one's responsibilities while in party office increase with the importance and degree of public trust reposed in that office.

** Even the office of county committee member is identifiable and differentiated; each such officer is elected to his or her post at primary elections by enrolled party members in his election district. See N.Y. Election Law §§ 12, 13. Whether or not different considerations would enter into a claim of privilege by a county committee member, no such question is presented here. This is not a class action, and appellee has sought and received from the District Court relief from the enforcement of N.Y. Election Law § 22 only as to himself. A.J.S., 21a.

improper interaction between two unrelated capacities of government. While the legitimate concerns of the State reflected in N.Y. Election Law § 22 are significantly greater and different than those in the *Garrity-Lefkowitz* cases, the effect of the statute on the appellee is of a much smaller degree. This balance of interests sufficiently favors the compelling interests of the State to require the upholding of N.Y. Election Law § 22 under the Constitution, and the reversal of the District Court.

The absence of harmful economic effect from the operation of § 22 is particularly significant, for it was the "threat of substantial economic sanction," *Lefkowitz* at 82, in each of the *Garrity-Lefkowitz* cases which grounded the holding of the Court that the statutes in question imposed "powerful forms of compulsion", *Spevack* at 516, which would render any testimony given thereunder inadmissible. While *Garrity* involved actual testimony and may have been based on a finding of involuntariness as a matter of fact, see *Garrity* at 502-06 (HARLAN, J., dissenting); *United States* v. *Solomon*, 509 F. 2d 863, 871 (2d Cir. 1975); *United States ex rel. Sanney* v. *Montanye*, 500 F. 2d 411 (2d Cir.), *cert. den. sub nom. Sanney* v. *Smith*, 419 U.S. 1027 (1974), the subsequent cases in that line established a *per se* rule that such testimony, if so compelled, would be involuntary as a matter of law. In the absence of a "substantial economic sanction", such an extraordinary *per se* rule would appear to be clearly unjustified.

The District Court decided, however, not only that the existence of a "substantial economic sanction" was irrelevant to the constitutionality of the statute, but that *any* statute "designed to elicit testimony . . . must be coercive or punitive for the statute to be effective." A.J.S., 13a. The District Court thus departed from established law requiring the court in each case to examine the effect of a challenged statute or procedure to determine if its impact upon a witness' Fifth Amendment rights assumes the dimension of a "penalty" in the constitutional sense. "[N]ot every undesirable consequence which may follow from the

exercise of the privilege against self-incrimination can be characterized as a penalty." *Flint* v. *Mullen,* 499 F. 2d 100, 104 (1st Cir.), *cert. den.* 419 U.S. 1026 (1974) (risk of adverse judgment in deferred sentence violation proceeding is not penalty for exercise of Fifth Amendment privilege). This Court has employed a similar standard to determine the contours of a "penalty" in the constitutional sense. See *Garner* v. *United States,* 424 U.S. 648, 661-65 (1976) (threat of prosecution for mistaken claim of privilege against self-incrimination not a penalty in constitutional sense); *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286 (1968) (threat of indirect economic harm through diminution of value of stock not penalty for stockholder's claim of privilege against self-incrimination); also see *Fuller* v. *Oregon,* 417 U.S. 40, 54 (1974) (statute imposing obligation to repay when possible the cost of free legal counsel provided to indigent defendant is not penalty for exercise of Sixth Amendment right to counsel); *United States* v. *Solomon, supra,* 509 F. 2d at 872 (threat of possible disciplinary action by New York Stock Exchange against member not sufficient penalty to constitute coercion of testimony); *United States ex rel. Sanney* v. *Montanye, supra,* 500 F. 2d at 415 (threat of loss of job as driver's assistant held one or two days not sufficient penalty to constitute coercion of testimony); *United States* v. *Moeller,* 402 F. Supp. 50, 55-56 (D. Conn. 1975) (testimony given under threat of possible denial of insurance recovery for fire loss not coerced).

The Court reaffirmed this principle most recently in *Baxter* v. *Palmigiano,* 425 U.S. ——, 96 S. Ct. 1551 (1976). In *Baxter,* a prisoner charged with disruption of prison operations was summoned to a disciplinary proceeding and informed that he was not required to testify and could remain silent, but that his silence could be used against him in support of an adverse decision by the disciplinary board. *Id.,* 96 S.Ct. at 1555. The prisoner chose to remain silent, was found guilty of the charges, and received punishment of 30 days in punitive segregation. The Court upheld the punishment and the use of the inference drawn from the inmate's silence, characterizing a disciplinary proceeding as "involv[ing] the correctional process and important state interests other than conviction for crime". *Id.,* 96 S. Ct. at 1558. The price of the prisoner's exercise of his Fifth Amendment privilege was the use of a resulting adverse inference against him; but this price was not a penalty in the constitutional sense in view of the important state interests at stake in the disciplinary proceeding. The Court distinguished the *Garrity-Lefkowitz* line of cases on the ground that they each involved a "serious economic reprisal" for the claim of Fifth Amendment privilege. *Id.,* 96 S. Ct. at 1557.

The Court in *Baxter* also distinguished the *Garrity-Lefkowitz* cases on the ground that in each case "failure to respond to interrogation was treated as a final admission of guilt". *Id.,* 96 S. Ct. 1557. In one sense the instant case differs from *Baxter* and matches the *Garrity-Lefkowitz* line, in that undisputedly the invocation of the Fifth Amendment privilege, without more, results in the loss of party office. Yet, in a more proper sense, this case does fall within the ambit of *Baxter* because, as has been shown, no punishment is imposed for which an "admission of guilt" has any relevance. Certainly the State draws no inference of guilt of whatever possible criminal offenses underlie the inquiry. Nor is there a finding of unfitness for a profession or job. Rather, the party officer's claim of Fifth Amendment privilege does no more than "admit" that he is unwilling to give a full accounting of his performance and conduct of his party office. That "admission" is conclusively and necessarily correct,* and no other admission is made, nor inference drawn.

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* It is the conclusive and self-evident nature of this admission which obviates the need for a hearing or other due process protections prior to the officer's removal from office. Cf. *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Board of Regents* v. *Roth, supra; Goldberg* v. *Kelly, supra.*

In sum, N.Y. Election Law § 22 does not infringe upon the exercise of the privilege against self-incrimination by the officers of its political parties. It places no unfair burden whatever upon the exercise of that privilege. It simply offers the party officer a choice between two alternatives: the rendering of a full accounting of the conduct of his party office and the performance of his duties without exercise of the privilege; or the yielding of his party office and the public trust reposed therein, and the opportunity to exercise the privilege, as well as all other constitutional rights and privileges, as a private individual. It is not a choice attended by coercion or duress, see *United States* v. *Solomon, supra,* 509 F. 2d at 872, and neither choice results in the loss of any significant economic benefit to the officer. By offering this choice New York meets all its obligations to its citizens—it strives to assure a political system free of the appearance of corruption as well as the reality of corruption, thereby fulfilling its most fundamental duty to retain the confidence of its citizens in the political system and the representative form of government; it also preserves the unfettered ability of all its citizens, including its political party officers, to exercise the rights secured to them by the Constitution. N.Y. Election Law § 22 is a proper, reasonable and fair enactment, and should be upheld.

POINT II

New York Election Law § 22 does not infringe upon the constitutionally protected freedom of association of appellee or the members of his party.

The appellee, supported by the *amicus curiae,* sought in the District Court to challenge N.Y. Election Law § 22 as violative of appellee's rights protected under the First Amendment as well as the Fifth Amendment (both applicable to the States through the Fourteenth Amendment). The District Court did not reach the First Amendment

claim, relying solely on the Fifth Amendment claim to invalidate the statute. Since appellant has contended that the District Court erred in its resolution of that claim, a separate discussion of appellee's First Amendment claim is appropriate.

A political party performs a mixture of public and private functions. It discharges certain public functions such as the selection of nominees for elective office, and in that capacity acts as an arm of the State subject to regulation by the State. *Smith* v. *Allright,* 321 U.S. 649 (1944); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973); *Terry* v. *Adams,* 345 U.S. 461 (1953). The public responsibilties of political party officers in New York have been set forth above; they include the selection of commissioners of the Board of Elections and of election officers, as well as the nomination of candidates in some circumstances. See pp. 3-4, *supra.* At the same time, a political party also has many of the attributes of a private organization and as such "enjoy[s] a constitutionally protected right of political association." *Cousins* v. *Wigoda,* 419 U.S. 477, 487 (1975); *Kusper* v. *Pontikes, supra.* The validity of any State statute regulating a political party turns on the function of the party being subjected to regulation and the actual effect of the statute on the party, as well as on the interest being promoted by the State through the statute. In this case, of course, the interest New York seeks to promote through Election Law § 22 is that discussed at the outset of Point I, *supra.* That interest carries as much force in the First Amendment context as in that of the Fifth Amendment, and supports the constitutionality of Election Law § 22 in this context as well.

The contention was raised below that *Cousins* v. *Wigoda, supra,* requires that § 22 be struck down. In *Cousins,* the 1972 Democratic National Convention had voted to seat a group of "insurgent" Illinois delegates in place of those chosen by the Democratic electorate in the party primary.

An Illinois judge enjoined the insurgents from taking their seats at the convention, they ignored the injunction, and the state court found them in contempt of the injunction. *Cousins, supra,* at 478-484. This Court reversed the decision of the Illinois courts, holding that the importance of the function of the national political parties in the presidential nominating process was so great as to outweigh Illinois' interest in the integrity of its electoral process. *Id.* at 490-91. The Court held that the convention itself, rather than the state courts, was " 'the proper forum for determining intra-party disputes as to which delegates [should] be seated'. *O'Brien* v. *Brown,* 409 U.S. 1, 34 L. ed 2d 1, 92 S. Ct. 2718 (1972)." *Id.* at 491.

In *Cousins,* the delegates' only function related to the internal operation of the Democratic Party in the process by which it selects a presidential candidate. The delegates performed no official function; rather they were chosen by Democrats to meet with other Democrats to select a Democratic presidential candidate. The states have no "constitutionally mandated role", *id.* at 489, in the selection of a party's presidential candidate, and no interest in the outcome or procedure of the convention.

In this case, as shown above, New York does have a substantial interest in the conduct of its party officers.* Where political party officers "perform public electoral functions . . . [they are] unquestionably playing an integral part in the state scheme of public elections." *Seergy* v. *Kings County Republican County Committee, supra,* 459 F.2d at 314. That role should and must be subject to control by the State. *Smith* v. *Allright, supra; Davis* v. *Schnell,* 81 F. Supp. 872 (D. Ala.), *aff'd.* 336 U.S. 933 (1949). The argument is raised that since party officers

* It should be noted, for instance, that candidates for party office, as well as party committees, are subject to the campaign contribution and expenditures limitations of Article 16-A of the Election Law. See N.Y. Election Law § 479.

may spend much more of their time on internal party affairs than on their public electoral functions, the State may not infringe on their ability to hold party office. Yet this argument, if accepted, would prove too much: taken to its logical conclusion it would force the State to accept anyone in party office—an individual not eligible to vote, a child, or an alien. In effect, the State would lose its unquestioned right to control the electoral process, and the party's freedom of association would become absolute.

"Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' [citation omitted]. Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley* v. *Valeo, supra,* 424 U.S. at 25. Further, of course, Election Law § 22 poses no threat to appellee's rights to associate with the Democratic party or any other group of his choosing; he may speak, advise, counsel and confer with any person, body or committee he wishes. He may be prohibited, under Election Law § 22, only from holding the formal party offices created by New York law and conferred with responsibility for significant public electoral functions. Thus, N.Y. Election Law § 22 does not infringe on the constitutionally protected associational freedoms of appellee or members of his party.

CONCLUSION

The order and judgment of the District Court should be reversed and the complaint dismissed in all respects.

Dated, New York, New York
November 30, 1976

Respectfully submitted,

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